First Demand Guarantee

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Abstract

The purpose of this monograph is to introduce (to those unfamiliar) the concept and characteristics of first demand guarantees, an atypical form of guarantee, which gives broad powers to its beneficiary, for he can execute such guarantee whenever he wants. Said guarantee are widely used in international contracts when the transaction reach very high figures, and the need to provide legal certainty to the performance of the services is vital. As well, in this monograph I'll be presenting a briefly description of the applicable law to the first demand guarantees, since such guarantees are a particularly international figure.

Introduction

These days is no secret that international commercial transactions are becoming more and more frequent and greater, regarding the monetary aspect. Far from being overrated, international contracts involve millions (and sometimes billions) of dollars in the field of international commercial trade, and this inevitably results in the need of contractual and legal certainty for such large investments. This need gave birth to a new type of guarantee: the **First Demand Guarantee**, which is issued as a guarantee against the event of a default in an obligation, monetary or not. Thus, in this paper will be analyzed the different types of guarantees on first demand and their applicability in each case.

I. GENERAL OUTLINES

1. Definition

Besides personal and accessory guarantees, such as endorsements and bonds, commercial practice and case law has developed another figure, a guarantee contract which isn't accessory to the main obligation, becoming autonomous and independent from the underlying contractual relationship that motivates the issuance of such guarantee (Fernández Rozas, 1996, p. 287). These are the first demand guarantees, which, in words of Pilar Perales and Rafel Illescas, "are characterized by the principles of independence, autonomy or abstraction, from the underlying contract that gives it life, which ensures" (Ilescas, Perales, 2003, p. 432).

Doctrine has given many denominations for this type of guarantee: first demand guarantee, pure guarantee, bank guarantee, first demand bank guarantee, etc. However, the use of these names is merely terminology, since what is sought is actually "the optimization of the guarantee, to obtain efficiency in the payment of the guarantee owned, and such efficiency can only be achieved to the extent that said payment can be done depending only on the claim by the beneficiary" (Calvo Caravaca, 1997, p. 1201).

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Author Font Galan defines first demand guarantee as "those which a guarantor (issuing bank), following the instructions of a client (main debtor) or other instructing party, undertakes the obligation to pay a certain amount of money to a third party (beneficiary) when required by it" (Font Galan, 1997, pp. 374, 375). The guarantee so constituted, will be subject to a claim of *simple demand* or *documentary demand*.

Roy Goode argues that "a demand guarantee can be defined as a commitment to pay a certain amount of money on presentation to the committed, of a written demand for payment and other documents, if so provided, within the period of validity of the guarantee" (Goode, 1992, p. 8).

Of the quoted definitions can be concluded that, a first demand guarantee is an **autonomous and independent** guarantee, whereby the guarantor, normally a bank, undertakes the responsibility in an irreversible and unconditional way, to pay the creditor of an obligation (the beneficiary) a certain amount of money, from the moment it is notified of the main debtor's default (guarantee account party).

A typical draft of a first demand guarantee establishes that the payment must be done *at first demand and without the need to present any proof, sentence, award or evidence of any kind*. It's said that a first demand guarantee "on one hand, grants the creditor a much high protection, and in the other hand, the guarantor is exposed to the risk of paying unjustifiably, because it is required to make the payment eve if the main debtor did meet its obligation" (Horn, Wymeersch, 1990, p. 8).

The use of phrases such as *first demand, irreversible and unconditional payment* and *payment without challenge* among others, are considered by the courts as "phrases that evidence the existence of a first demand guarantee" (Bertrams, 2004, p. 230).

2. First demand guarantee's characteristics

With the purpose of a deeper analysis of the first demand guarantee, in this section will be presented two main characteristics of said figure (Gómez, Marques, 2006, pp. 195-197):

a) *Independence and autonomy towards the guaranteed obligation.*

Although the issuing of the guarantee drives from the underlying contract that links the account party with the beneficiary, the guarantee is independent from said contract, and the rights and obligations under the guarantee are to, independent from the ones derived from the underlying contract which, in principle, doesn't concern or affect the guarantor.

The debtor and guarantor's responsibilities are independent from each other and can have different length and content. Also, there's the possibility of the guarantor to commit itself to pay a larger amount of money than the obligation guaranteed, since the guarantor is not liable for the debt of others, but for a directly and self-assumed obligation.

The fact that enforces the guarantor to pay the beneficiary is not the main debtor's default, but the notice of said default to the guarantor, together with the requirements agreed, in each case. Once the beneficiary's claim is received, the guarantor must pay immediately.

Because of all the above mentioned, these guarantees doesn't hold the accessory characteristic of, for example, the bond, and the guaranteed obligation doesn't play the role of main obligation, for its vicissitudes do not affect the guarantee.

The guarantee is also independent from the relationship between the account party and the guarantor; therefore, the guarantor cannot rely on a breach of the account party (e.g. default to pay commissions or to provide funds) to avoid payment of the guarantee in case it is requested by the beneficiary.

b) *Unenforceability of exceptions derived from the guaranteed obligation.*

This quality is a direct consequence of the last one. The guarantor cannot enforce against the beneficiary other exceptions than those derived from the guarantee itself, according to its draft and content and mainly, to its execution requirements provided in the very own guarantee.

These exceptions have the quality of being *literal*, since they derive from the very own text of the guarantee, so they can be enforced by the guarantor against the claim of the beneficiary. Among these exceptions, we can mention the circumstance in that the claim is filed in a different way than the required; outside the limitation period of the guarantee; without the required documents (documentary first demand guarantee); or claim the payment in a different currency than the one specified in the guarantee.

Regarding the relationship between the guarantor and the account party, we found ourselves in front of the application of the principle ***solvet et repete*** (pay first, ague later). The guarantor is obliged to pay in the terms agreed in the guarantee contract, independent for the latter right to claim against the account party the reimbursement of the amount paid. The guarantor cannot enforce against the beneficiary the exceptions derived from the underlying relationship. It must conduct said exception against the account party, who will later be able to act against the beneficiary, based on the underlying guaranteed relationship.

Maximum creditor protection is sought with these qualities, giving more security and certainty that the credit will be satisfied (through the main debtor or the guarantor). It also makes the guarantee more effective, since the default of the guaranteed obligation won't cause any inconvenience or discomfort to the beneficiary.

3. Documentary First Demand Guarantee

Now, it is important to mention the documentary first demand guarantee. Different from a simple demand guarantees, where the payment depends only on the written claim of the beneficiary, in compliance with the agreed requirements and deadline, "the documentary first demand guarantee is the one whose conditions require the beneficiary to submit to the guarantor certain documents or certifications, reinforcing the claim based on the guarantee" (Camacho, 1994, p. 54).

Prominent authors, such as Gavalda and Stoufflet, explains that the document reinforces it independent quality, since the guarantor won't have to deal with facts, but only with documents, since the guarantor will be a bank or an insurance company, which normally deals only with documents (Gavalda, Soufflet, 1980, p. 13).

The documentary quality is extended to the conditions for effective beginning, extinction and reduction of the amount of the guarantee. This way, the effective beginning of the guarantee will be determined by the documents specified in the guarantee, if the requisites are observed. The extinction will depend on the presentation of certain documents. Regarding the reduction of the amount, the Uniform Rules for Demand Guarantees, developed by the International Chamber of Commerce, determine that said reduction can be done when the specific document is delivered. These guarantees are paid "on demand", but as indicated by its name, not only on demand, because these type of guarantee not only include guarantees payable on the presentation of a simple written claim, but "they can also be enforced along with the presentation of documents or declarations of third parties that highlights the default of the debtor" (Serrano, 1999, pp. 187, 288).

4. Legal Nature. Comparison with similar institutions

The first demand guarantee is the result of contractual freedom, which has been imposed by practice and recognized by jurisprudence (in cases such as *Compañía Española de Seguros de Crédito y Caución S.A. vs. Lubricantes del Sur, S.A.*, or *Compañía General de Tabacos de Filipinas S.A. vs. Catalonian Overseas Investments S.A.*). However, its autonomous and independent nature are still controversial, mainly because of its similarity to figures like the endorsement or the bond. Thus, in order to understand a little bit more about the first demand guarantee, it is important to compare it with similar institutions.

Firstly, the first demand guarantee, being autonomous, is similar to the **endorsement** (sections 1722 through 1724 of the Paraguayan Civil Code), because, being the endorsement a typical exchange guarantee, "It generates an autonomous obligation regarding the good faith third party" (Walker de Tuler, 2005, p. 89). Nevertheless, the difference remains in the fact that the endorsement is always linked to an exchange obligation, while the first demand guarantee can be linked with all kind of obligations.

Regarding its relation to the **bond** (sections 1456 through 1470 of the Paraguayan Civil Code), the main differences relies in the field of accessoriness, since this quality does not appear in the relationship between the guarantor and beneficiary. Said relation is independent from the underlying contract, whose performance is ensured.

It also relates to the **Stand-by Letter of Credit (SBLC)**, at such point that, in the United States they are considered as a species of the same genus. However, fundamental differences exist between the nature of First Demand Guarantees and SBLC's. For example, SBLC's are issued as a contingent liability of the issuing banks and are issued in conjunction with a primary means of underwriting being considered. In effect SBLC's are as they sound: they are in a "Stand-by" position to a primary means of repayment. First Demand Guarantees can be issued to be the primary means for repayment. In which case, they are not necessarily contingent in nature. Because of the contingent and secondary means of collateral nature of the SBLC, it would be considered counter-intuitive for a bank to underwrite a loan or facility strictly on the basis of receiving an SBLC. A bank lending against an SBLC alone in such a manner would in effect be purposefully underwriting a loan with the expectation that there was to be a default, which is not something your typical bank regulators would approve.

Demand Guarantee can be issued as the primary means for meeting the loan or facility repayment terms.

It's also important to mention that, the first demand guarantees permits the possibility of acting with banks or enterprises, however, the SBLC "is a proper banking operation" (Walker de Tuler, 2005, p. 90).

5. Parties involved in the First Demand Guarantee

From the definitions given at the beginning of this paper, it´s clear the existence of a triangular relationship between the main actors of this figure: the account party, the guarantor and the beneficiary. Below, a description of each one:

- **The Guarantor**: is the issuer of the guarantee, undertaking the responsibility of paying according to the terms agreed.
- **The Account Party**: is the party on whose account and under whose responsibility and instructions, the guarantee is issued. It's usually the debtor of the underlying contract.
- **The Beneficiary**: is the party in whose favor the guarantee is issued and the one with the right to claim it. It's usually the creditor of the underlying contract.

II. APPLICABLE LAW

1. *Lex Mercatoria* as applicable law.

It is important to define the applicable law ruling the independent guarantees, because these are conceived as a sort of contract. That's why the problem of demand guarantee's applicable law can be related to the general problem involving the contracts' applicable law, with the peculiarities of each case.

In this matter, there are two possibilities: a) that the parties of the guarantee contract exercise their will autonomy; or b) that they remain in silence about the choice of law.

a) Party Autonomy

Through party autonomy, parties of international contracts may choose the applicable law governing their relation, or incorporate clauses created by the parties.

So, the parties may, through their will autonomy, choose the *lex mercatoria* as the applicable law governing their contractual relationship. The parties may choose, not a national law, but a transnational one, created by customs.

For example, the *ICC Uniform Rules for Demand Guarantees (ICC Publication N° 458)* gives this possibility. These rules are usually chosen by the parties to govern their guarantee contract, and they are part of the content of the *lex mercatoria*.

In conclusion, is perfectly feasible the possibility of the parties to a guarantee contract to govern their contract through their own clauses, or choose, for example, the ICC Uniform Rules.

b) Absence of choice of law by the parties

In the absence of autonomy of the parties regarding the choice of law, it could be used the conflict of law rules regarding guarantee contracts. In the absence or specific rules governing this type of contract, then it will be necessary to use general conflict of law rules regarding international contracts.

Nevertheless, is important to ask ourselves if it's possible, before turning to the rules of conflict, to choose to govern the guarantee contract by other source of law, this is, by customary rules.

The answer is positive. The judge that must determine the applicable law to an international guarantee contract can, or better, must turn to transnational law, or the new *lex mercatoria*, and apply it, even without express choice of the parties. But still another question arises: why use the customary rules instead of the legal rules, in the event they concur.

Author Hector Alegría explains that "in situations not regulated legally, one must turn to the customary rules"; and considers that, for example, "the Uniform Rules constitute a manifestation of international legal custom" (Alegría, 1194, pp. 158-161).

From an international private law perspective, Harold Berman holds that *lex mercatoria* configures a sort of *legal custom*; more emphatic, Argentinian author Boggiano admits that, in some cases "lex mercatoria can be considered as legal custom" (Boggiano, 1991, pp. 65, 66).

Finally, from the eyes of the General Theory of Law, both Goldschmidt and Nino consider that "in a conflict between legal and customary rules, the last one always prevails" (Goldschmidt, 1986, p. 249).

1.2 The problem of "Public Policy" rules

The above mentioned is applicable to international contract in general, it means, they can be governed both by party's autonomy or customary law or *lex mercatoria*.

Still we must ask ourselves if *lex mercatoria* is actually a legal system, independent from national law, or if it depends on them.

Lex mercatoria critics argue that it has well defined limits when having to perform the obligations under an international agreement. This means, even when a contract can be governed by *lex mercatoria*, if it's necessary to turn to a national judge for its enforcement, this judge will have to make sure that the applicable law of the contract doesn't violate the "public policy" principles of the State where it must be enforced.

However, according to other authors, this limit can be extended, if the parties establish that, in the event of disputes arising from the guarantee contract, said disputes shall be settled by international arbitration. And arbitrators, not being representatives of any State, are less committed to contrast the contents of the *lex mercatoria* with the content of state law.

Quoting once again Goldschmidt, he has called this possibility (arbitration) "universal autonomy", because the contract wouldn't be tied, initially, to any state law (Goldschmidt, p. 1268).

Yet, notwithstanding the award rendered by the international arbitrator based on the *lex mercatoria* governing the contract, if the losing party is unwilling to

voluntarily comply with award, the winning party won't have any other alternative but to turn to the national judge in order to enforce the award, and in this case, the state judge will have to make sure that public policy isn't violated.

In short, lacking the *lex mercatoria* and international arbitration of the possibility of using the force or *imperium*, quality reserved only for the State, the first wouldn't be properly a legal system, and it would always depend on the national legal system.

2. The United Nations Convention on Independent Guarantees and Stand-By Letters of Credit

Given the subject we're treating in this point (applicable law on demand guarantees), is important to mention, even briefly, the United Nations Convention on Independent Guarantees and Stand-By Letters of Credit (New York 1995), which became effective on January 1st 2000.

Nevertheless, it has not been very successful, if it's judge by the number of ratifications of adhesions: only eight countries by December 2006 (Belarus, Ecuador, El Salvador, Gabon, Kuwait, Liberia, Panamá and Tunisia. The United States signed it but didn't ratify it). The apparent failure of this convention has been object of several observations, such as the imperative nature of its rules, in contrast with the non-mandatory quality of the ICC Uniform Rules; and the establishment of an inadequate system for the vast variety of independent guarantees and stand-by letters of credit.

This convention is applicable to international demand guarantees, if the guarantor is established in a signatory country or if the international private law rules leads to the application of a signatory country, unless the text of the guarantee expressly excludes the applicability of the convention (article 1).

This Convention applies also to an international letter of credit not falling under the definition given in article 2, if it expressly states that it is subject to this Convention.

In article 2, both the demand guarantee and the stand-by letter of credit, are considered as an **undertaking**, which is defined by this article as "an independent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person."

Similarly, **counter-guarantees** are considered as an **undertaking** (article 6, subsection c). They are defined as "an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment under that other undertaking has been demanded from, or made by, the person issuing that other undertaking." The definition may seem a little

confusing, but in simpler words, the counter-guarantee is issued to protect the guarantor, who issues a demand guarantee.

In this way, the Convention is a powerful tool that is given to international traders, being an instrument for legal certainty and legislative uniformity, regarding first demand guarantees.

3. The ICC Uniform Rules for Demand Guarantees (URGD)

Another essential uniform regulatory body (quoted before) that has to be taken in consideration when drafting and signing a first demand guarantee is the URDG.

They are applicable to independent demand guarantee and also to the counter-guarantees. Regarding the stand-by letters of credit, the URDG are not applicable, in contrast with the United Nation Convention on Independent Guarantees and Stand-By Letters of Credit. So, the stand-by letters of credit will be subject to the international customs and practice regarding them.

The URDG contains rules regarding formalities for the drafting of a demand guarantee contract, such as issuing forms (in writing), the information that must necessarily have, the entry into force, the form and analysis of the claim made by the beneficiary, the extinction of the guarantee and, above all, the applicable law and jurisdiction.

It is worth mentioning this last provision, related to the applicable law and jurisdiction. The **applicable law** to the demand guarantees is, firstly, that who the parties agree in the guarantee contract. In default of choice of law by the parties, the article 27 of the URDG states that the applicable law will be the one of the establishment of the guarantor, and if the guarantor has more than one establishment, will be the one of the branch or establishment that issued the guarantee.

Regarding jurisdiction, normally the guarantor and beneficiary will expressly submit their controversies to a determinate forum for them to be resolved, for example, arbitration, since the demand guarantee is, in most cases, an international contract. In default of an agreement regarding the applicable jurisdiction, article 28 of the URDG states that controversies shall be resolved by the competent Tribunals of the country where the guarantor has its establishment, and if the guarantor has more than one establishment, will be the one of the branch or establishment that issued the guarantee.

III. FIRST DEMAND GUARANTEES AND THE UNDERLYING CONTRACT ARBITRATION CLAUSE

Notwithstanding the possibility of introducing an arbitration clause in the guarantee contract, there is the possibility that the underlying contract also have an arbitration clause. In this scenario, several courts have held that the arbitration agreement in the underlying contract (between the debtor and creditor) doesn’t have any effect on the guarantor that has issued a first demand guarantee. This thesis is sustained on the legal nature of the demand guarantee, which characterizes it as an autonomous and independent contract, and so, free of any link with the obligations emerging from the underlying contract. In this matter, author Bernard Hanotiau has pointed out that the

underlying contract arbitration agreement "can't have any influence whatsoever in the enforcement of the first demand guarantee" (Hanotiau, 1999, p. 16).

An interesting example of the non-applicability of the underlying contract arbitration agreement on the demand guarantee happened in the *CSEE vs. BNP* case. In said case, French courts held that the underlying contract arbitration agreement cannot be applied to the first demand guarantee because the "independence" of the guarantee makes it an isolated contract from the underlying one. Plus, the French courts held that the autonomous nature of the first demand guarantee makes the link between it and the underlying contract to be minimum, since its enforcement doesn't depend on the debtor's compliance or not, it only depends on the beneficiary's claim.

IV. CONCLUSIONS

Demand guarantees developed to replace money deposits, which sellers had to provide to buyers in order to secure the latter against the former's default under the contract. The substitution of money deposits by demand guarantees helped account parties to maintain their liquidity: they were no more forced to tie up their money for a considerable period of time pending completion of the underlying contracts, and where the account party had no sufficient money to pay an upfront deposit, it was relieved from the expense of borrowing cash from a banker and paying interest on the loan during its life. The account party also benefits from the low cost of demand guarantees compared to other instruments such as accessory guarantees.

The account party might not trust the beneficiary enough to agree to provide him with a cash deposit. Similarly, the beneficiary might doubt the account party's solvency, and therefore, ability to fulfill the underlying contract or its ability to rectify defaults in performance.

The demand guarantee bridges the "gap of distrust" that exists between the parties. When the bank issues the demand guarantee, the beneficiary deals with a party whose financial strength he can trust and a party which would pay upon first demand, regardless of an existing dispute between the parties on the performance of the underlying contract (Andrews, 1988, p. 149). More importantly, however, the demand guarantee is also used to reallocate the risks between the parties. In this regard, the demand guarantee is used to avoid three types of risk: judgment risks, execution risks and jurisdictional risks.

Judgment risks include, inter alia, risks involved in taking the dispute to court, losing on a procedural issue, the risk of an unfriendly court, evidentiary problems and the threat of political uncertainty that could prevent an action being brought against a party.

Execution risks include the risk that a plaintiff could not execute a judgment against the defendant. This is often due to defendant insolvency or to the unenforceability of one country's court judgments in another country.

Finally, **jurisdictional risks** are part of both the above risks: they revolve mainly around the costs and difficulty that a party would endure when bringing an action against the defendant who is usually located in another jurisdiction. Where the beneficiary is issued a demand guarantee by a bank in his own locality, the guarantee aims "to shifting of risks and the cost of bearing them from (the beneficiary to the account party)" (Dolan, 1985, p. 5).

Should the beneficiary find the contractor in default, he can immediately seek compensation by demanding on the guarantee and it is the account party who is forced to bring an action to recover any disputed amount. The premise in such transactions is that by agreeing to provide a demand guarantee both the account party and the beneficiary agree that the latter should not be deprived of his money (money due under the guarantee) by litigation against him at the suit of the account party.

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